

Advisory Opinion
Case No. 04058.A, Post-employment

To: [John Doe]

Date: January 12, 2005

You are President and Chief Operating Officer of [ABC, Inc.], an Illinois construction firm and City subcontractor. You previously served as Commissioner of [City Department U]. On October 11, 2004, you requested an advisory opinion under the City's Governmental Ethics Ordinance. You asked us to address how your former service as Commissioner [of Department U] affects your ability, and that of your new employer, [ABC, Inc. (ABC)] to participate in: 1) two specific contracts [with your former department]; and 2) business transactions involving the City's [facility] system generally.¹

After careful consideration of the facts presented and the relevant law, the Board has determined that you are subject to significant restrictions (set forth in detail below in the "Determinations" section of this opinion) under both the one-year and permanent prohibitions of the Ordinance's post-employment provisions. In summary, as to the specific matters you raised, you are permanently prohibited from assisting or representing [ABC, Inc.], or any other person other than the City, on either of the contracts [with your former department] you identified; you also are prohibited for one year from the date you left City service from assisting or representing [ABC, Inc.], or any other person other than the City, on any business transaction involving the operation, maintenance or development of the City's [facility] system, including but not limited to [Facility 1 and Facility 2].

FACTS: City Service as [Commissioner of Department U].² You were appointed Commissioner of [Department U] on [DATE] and served in that capacity until you resigned from City service on [DATE]. As Commissioner, you had overall and ultimate responsibility for [the City's facility system] which, at that time, included three [facilities]: [Facility 1, Facility 2 and Facility 3]. Your responsibilities included overseeing the various functions within [that facility system] such as [facility] operations, maintenance, planning, finance, capital projects, security and [certain other functions].

¹ Under Rule 3-10 of the Board's Rules and Regulations, the identity of any person requesting an advisory opinion, and the identity of any person whose conduct is involved in the set of circumstances described in the request, shall remain confidential in accordance with Section 2-156-380(l) of the Ethics Ordinance. Any party to the request, however, may waive his confidentiality. In a supplemental letter to the Board, dated October 12, 2004, you gave the Board permission to speak to [ABC] and to [Department U] in responding to your request for an advisory opinion.

² In [YEAR], you entered City employment and held various posts in City government until you were appointed Commissioner of [Department U].

In carrying out your various responsibilities, you were assisted by a management team that included a First Deputy and several Assistant Commissioners, as well as numerous Deputy Commissioners. Each major functional area was headed by a Deputy Commissioner. Deputies of related functional areas reported to managing deputies who, in turn, reported to you. Your management team oversaw the work of approximately [number] Department employees, most of whom were assigned to a single [facility].³ This City staff was augmented by Department consultants, vendors, contractors, construction managers and various other professional service providers. These services were acquired through RFQs, RFPs and public bids issued by the Department of Procurement Services with the assistance of the City's Law Department. Typically, your role in these procurement processes was one of general oversight and periodic review of progress; a Deputy or other Department staff member typically had direct oversight responsibility.

[ABC, Inc.] On [DATE], you joined [ABC], an Illinois construction firm and City subcontractor, as its President and Chief Operating Officer. You stated that [ABC] is an Illinois-based construction company consisting of approximately 65 full time employees. [ABC] focuses on projects in the \$1,000,000.00 to \$5,000,000.00 range. When necessary, [ABC] contracts for larger projects through joint ventures. Since its founding in [YEAR], [ABC] has provided a range of construction services including: (i) general contracting; (ii) construction management; (iii) program management; and (iv) trade work.⁴

As President and Chief Operating Officer of [ABC], you are responsible for the management and oversight of [ABC's] day-to-day activities, including finances, administration and operations. Reporting to you are a Senior Vice-President for Construction, a Vice President for Construction, a Vice President for Estimating and Construction, an Assistant Vice President for Human Resources and a Controller. You, in turn, report to [ABC's] Board of Directors. [John Smith, ABC's Chief

³ A limited number of City personnel were responsible for oversight of functions which were common to all three [facilities].

⁴[A corporate history of ABC, Inc. follows.]

Executive Officer], is also Chairman of [ABC's] Board. [Mr. Smith] is responsible for marketing, as well as managing and directing the Senior Vice President for Construction on all [Department U] matters.

[ABC] as City Subcontractor. You have asked us to address 2 specific [Department U] contracts in this advisory opinion:

1. *[Contract 1]*. On or about [DATE], the City entered into a [development and lease agreement] with [Contractor 1], a joint venture of [Entity 1 and Entity 2]. Under this agreement, the joint venture is developing [facilities on a particular parcel of land.] [John Smith], a principal and Chief Executive Officer of [ABC], is, himself, a member of [Entity 2]. In addition, [ABC], is a subcontractor to the joint venture and has performed construction work at [the site] pursuant to this contract.

You stated that your involvement as Commissioner [of Department U] in the selection/award/execution of [Contract 1] included the following: you reviewed and approved the scope of services for the RFP developed by [a Department U Managing Deputy]; although you were not part of the City team that reviewed and scored responses to the RFP, you did review and approve the team's contract-award recommendations; and although you did not participate in contract negotiations, you did recommend negotiation and execution of an agreement with [Contractor 1] to the City's Chief Procurement Officer.

2. *[Contract 2]*. On or about [DATE], [Contractor 2] entered into a contract with the City to provide construction management services to [Department U]. [ABC] is a subcontractor to [Contractor 2] on this contract and is currently overseeing construction work by [another contractor] at [Facility 1].

You stated that your involvement as Commissioner [of Department U] in the selection/award/execution of [Contract 2] included the following: you reviewed the scope of services for the RFQ developed by [a Department U Managing Deputy]; although you were not part of the City team that reviewed and scored responses to the RFQ, you did review and approve the team's contract-award recommendations; and although you did not participate in contract negotiations, you did recommend negotiation and execution of an agreement with [Contractor 2] to the City's Chief Procurement Officer. You stated that, as Commissioner [of Department U], you also participated in Department discussions on how to apportion work between [Contractor 2] and another Department contractor (providing construction management services for [facility] and civil work).

Ethical Screen. You stated that since joining [ABC] on [DATE], you have had no involvement in either [Contract 1 or Contract 2]. You stated that during your pre-employment discussions with [ABC], you brought to the attention of [ABC management] the restrictions imposed on former City employees by the post-employment provisions of the City's Governmental Ethics Ordinance. You stated that all matters relating to [ABC's] work at [Facility 1] are being handled by [ABC management team members other than you]. In addition, you stated that [ABC's] executive team, consisting of the Vice Presidents and the CEO, have all been advised of the Ordinance's post-employment restrictions and have been directed to take up all [City Department U] matters with [two particular ABC officers].

LAW: Section 2-156-100 of the Governmental Ethics Ordinance (Post-Employment Restrictions) states:

(a) No former official or employee shall assist or represent any person other than the City in any judicial or administrative proceeding involving the City or any of its agencies, if the official or employee was counsel of record or participated personally and substantially in the proceeding during his term of office or employment.

(b) No former official or employee shall, for a period of one year after the termination of the official's or employee's term of office or employment, assist or represent any person in any business transaction involving the City or any of its agencies, if the official or employee participated personally and substantially in the subject matter of the transaction during his term of office or employment; provided, that if the official or employee exercised contract management authority with respect to a contract this prohibition shall be permanent as to that contract.

“Assisting” and “representing” a person in business transactions involving the City include helping a person to seek, as well as perform, a contract. Case No. 89119.A. “Assisting” and “representing” also include activities such as rendering advice, appearing before any City commission, board, department or agency, negotiating contracts, or preparing or submitting documents on behalf of that person. Case No. 89144.A. Further, the one-year prohibition under Section 2-156-100(b) begins on the date the employee's or official's City employment or term of office terminates, not on the date that he or she stopped performing particular tasks. Case No. 94011.A.

ANALYSIS: You have asked the Board to address how your former service as Commissioner [of Department U] affects your present ability, and that of [ABC], to participate in: 1) [Contract 1 and Contract 2] and 2) business transactions involving the City's [facility] system generally.

Permanent Prohibitions.

Sub-Section 2-156-100(a). We first address the permanent prohibitions. Under sub-section 2-156-100(a), you are permanently prohibited from assisting or representing any person other than the City in any judicial or administrative proceeding involving the City if you participated personally and substantially in the proceeding as a City employee.⁵

Sub-Section 2-156-100(b). Under the second clause of sub-section 2-156-100(b), you also are permanently prohibited, after leaving City service, from assisting or representing any person other than the City on a contract over which you exercised contract management authority as a City employee. Section 2-156-010(g) defines the term “contract management authority” as “personal involvement in or direct supervisory responsibility for the formulation or execution of a City contract, including without limitation the preparation of specifications, evaluation of bids or proposals, negotiation of contract terms or supervision of performance.”

As to [Contract 1], you stated that you reviewed and approved the scope of services for the RFP developed by [a Department U Managing Deputy]; although you were not part of the City team that reviewed and scored responses to the RFP, you did review and approve the team’s contract-award recommendations; and although you did not participate in contract negotiations, you did recommend negotiation and execution of an agreement with [Contractor 1] to the City’s Chief Procurement Officer.

As to [Contract 2], you stated that you reviewed the scope of services for the RFQ developed by [a Department U Managing Deputy]; although you were not part of the City team that reviewed and scored responses to the RFQ, you did review and approve the team’s contract-award recommendations; and although you did not participate in contract negotiations, you did recommend negotiation and execution of an agreement with [Contractor 2] to the City’s Chief Procurement Officer. You stated that, as [Commissioner of Department U], you also participated in Department discussions on how to apportion work between [Contractor 2] and another Department contractor.

Based on your involvement in, and responsibility for, [Contract 1 and Contract 2], as described by you, the Board concludes that you exercised contract management authority over both contracts. Therefore, the Board determines that under subsection 2-156-100(b) of the Governmental Ethics Ordinance, you are permanently prohibited upon leaving City service from assisting or representing [ABC, Inc.], or any other person other than the City, on either [Contract 1 or Contract 2].

⁵Because you are not an attorney, that part of sub-section 2-156-100(a) which relates to proceedings in which a former employee was “counsel of record” has no application to your situation.

One-Year Prohibition.

Subsection 2-156-100(b). We next address the one-year prohibition. Under the first clause of subsection 2-156-100(b), you are prohibited, for one year after leaving City service, from assisting or representing any person in a business transaction involving the City, if you participated personally and substantially in the subject matter of that transaction as a City employee.

As the Commissioner [of Department U], you had overall and ultimate responsibility for the City's [facility] system which, at that time, included three [facilities]: [Facility 1, Facility 2 and Facility 3]. Your responsibilities included overseeing the various functions within [that facility system] such as [facility] operations, maintenance, planning, finance, capital projects, security and [certain other functions]. Based on your duties as Commissioner, the Board concludes that you were personally and substantially involved in the operation, maintenance and development of the City's [facility] system. Therefore, the Board determines that, under subsection 2-156-100(b) of the Governmental Ethics Ordinance, you are prohibited for one year from the date you left City service, that is, until [DATE], from assisting or representing [ABC, Inc.], or any other person other than the City, on any business transaction involving the operation, maintenance or development of the City's [facility] system, including but not limited to [Facility 1 and Facility 2].

DETERMINATIONS: In summary, after careful consideration of the facts presented and the relevant law, the Board has determined that:

1. under subsection 2-156-100(a) of the Governmental Ethics Ordinance, **you are permanently prohibited** from assisting or representing [ABC Inc.], or any other person other than the City, in any judicial or administrative proceeding involving the City or any of its agencies, if you participated personally and substantially in the proceeding during your tenure as a City employee;

NOTE: You have not identified any judicial or administrative proceeding which you wish the Board to address in this opinion. The Board notes that, based on the nature of the various posts you occupied during your years of City service [as
and as _____], it is possible that you participated personally and substantially in judicial or administrative proceedings involving the City. If, in the future, you have a question as to whether you are permanently prohibited from assisting [ABC Inc.], or any other person, in some judicial or administrative proceeding, you should contact the Board for specific guidance;

2. under subsection 2-156-100(b) of the Governmental Ethics Ordinance, **you are permanently prohibited** from assisting or representing [ABC, Inc.], or any other person other than the City, on any City contract over which you exercised contract management authority during your tenure as a City employee. This prohibition includes, but is not limited to: (i) [Contract 1] and (ii) [Contract 2];

NOTE: In this opinion, the Board has addressed 2 specific [Department U] contracts that you identified. The Board notes that, based on the nature of the various posts you occupied during your years of City service [as _____ and as _____], you likely exercised contract management authority over other City contracts. If, in the future, you have a question as to whether you are permanently prohibited from assisting [ABC, Inc.], or any other person, on some other City contract, you should contact the Board for specific guidance;

3. under subsection 2-156-100(b) of the Governmental Ethics Ordinance, **you are prohibited for one year from the date you left City service**, that is, until [DATE], from assisting or representing [ABC, Inc.], or any other person other than the City, on any business transaction involving the City if you were personally and substantially involved in the subject matter of the transaction during your tenure as a City employee. This prohibition includes, but is not limited to, assisting or representing [ABC, Inc.], or any other person other than the City, on any business transaction involving the operation, maintenance or development of the City's [facility] system, including but not limited to [Facility 1 and Facility 2].

NOTE: In this opinion, the Board has addressed business transactions involving the City's [facility] system. The Board notes that, based on the nature of the various posts you occupied during your years of City service [as _____ and as _____], you likely participated personally and substantially in the subject matter of other businesses transactions involving the City. If, in the future, you have a question as to whether you are prohibited until [DATE], from assisting or representing [ABC, Inc.], or any other person other than the City, on some other business transaction involving the City, you should contact the Board for specific guidance; and

4. **FINAL NOTE:** With regard to both the Ordinance's permanent and one-year prohibitions, the Board notes that these restrictions, detailed above, apply to you, personally as a former City employee. They do not apply to your new employer, [ABC, Inc.] generally. Therefore, [ABC, Inc.] may assist and/or represent persons whom you, personally, are prohibited from assisting or representing, so long as you do not assist [ABC, Inc.], its owners, officers or employees in any way on those matters. However, should your conduct not conform to the restrictions detailed above, that is, should you assist [ABC, Inc.] (or any other person other than the City) on a City contract in violation of the Ordinance's post-employment provisions, it could result in the voiding of that contract by the City pursuant to Section 2-156-430 of the Ordinance.

Further, we advise you that Section 2-156-070 of the Ethics Ordinance, "Use or Disclosure of Confidential Information," prohibits you from using or disclosing any confidential information gained in the course of your City employment. "Confidential information" is defined as any information that may not be obtained pursuant to the Illinois Freedom of Information Act.

Our determinations do not necessarily dispose of all issues relevant to this situation, but are based solely on the application of the City's Governmental Ethics Ordinance to the facts stated in this opinion. If the facts stated are incorrect or incomplete, please notify the Board immediately, as any change may alter our opinion. Other laws or rules may also apply to this situation. Additionally, should the facts presented change, you should contact the Board for further review of the matter.

RELIANCE: This opinion may be relied upon by (1) any person involved in the specific transaction or activity with respect to which this opinion is rendered and (2) any person involved in any specific transaction or activity indistinguishable in all its material aspects from the transaction or activity with respect to which the opinion is rendered.

Darryl L. DePriest
Chair